82-938

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DANIEL T. PAUER, PETITIONER

-vs-

STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT

EDWARD T. BRICE
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Chardon, Ohio 44024
(216) 285-3179

QUESTIONS PRESENTED FOR REVIEW

A. Was Defendant-Appellant denied a fair trial from the State of Ohio, by an impartial jury, as guaranteed by the Sixth Amendment of the Constitution of the United States, when it is established that the Jury Foreman was guilty of bias, misconduct, and misrepresentations to the Trial Court and trial counsel at jury voir dire, and to the other jurors during deliberations?

B. Is Ohio Revised Code Section 2925.03 (A)(3) (Cultivation of Marijuana) repugnant to the United States Constitution on the basis of vagueness, ambiguity, and violation of due process, when it does not specify cultivation of marijuana itself as a prohibited activity, and does not specify any maximum amount; yet, in a following subsection, permits cultivation for personal use as an affirmative defense with the burden of showing same placed upon

the accused by a preponderance of the evidence (Ohio Revised Code section 2925.03(F); at the same time, Ohio Revised Code Section 2925.11(C)(3) prohibits possession or use of marijuana (but if such possession or use is less than 100 grams it does not constitute a criminal record).

C. Did the trial court incorrectly rely on Franks v. Delaware, 438 U.S. 154 (1978), in denying Defendant-Appellant an evidentiary hearing for his Motion to Suppress the Search Warrant as invalid, and quashing the subpeonas of his witnesses for this evidentiary hearing, on the basis of a lack of substantial preliminary showing, when trial counsel for Defendant-Appellant had stated to the Court at the scheduled hearing the specifics of the search warrant affidavit that were false or misleading, and had the witnesses there ready to verify these falsifications and misrepresentations?

D. Is the issuance of a search warrant upon probable cause which at most establishes a non-criminal minor misdemeanor offense, therefore, an "unreasonable" search and seizure under the Fourth Amendment of the United States Constitution? McDonald v. U.S., 335 U.S. 451, 460 (1948, Justice Jackson concurring).

E. Was Defendant-Appellant denied due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution when the trial court permitted the jury to decide if Defendant-Appellant was guilty of cultivation of marijuana, instead of mere possession or use, when the State's evidence had only shown that Defendant-Appellant had used marijuana, while his Wife actually grew it?

F. Was the placing upon Defendant-Appellant by Ohio Revised Code section 2925.03(F), the burden of going forward with evidence of possession/use of marijuana

solely for personal use, and with burden of proof, by preponderance of evidence, possession or cultivation solely for personal use, violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, that prosecution prove beyond a reasonable doubt the absence of solely personal use when that issue has been properly presented? Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 955 S.Ct. 1881 (1975).

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JURISDICTIONAL GROUNDS

This is an appeal from the State of Ohio of the conviction of Defendant-Appellant on September 24, 1979, under Ohio Revised Code section 2925.03(A)(3), Trafficking/ Cultivating Marijuana. This conviction was affirmed by the Eleventh District Court of Appeals of Ohio on April 1, 1982. On September 15, 1982, Motion for Leave to Appeal to the Supreme Court of Ohio was overruled, and the Appeal as a Matter of Right was dismissed.

It is from the Supreme Court of Ohio entries that Defendant-Appellant now seeks review and certiorari.

The United States Supreme Court has jurisdiction to hear this matter under 28 U.S.C. Section 1257(2) and (3); 28 U.S.C. Section 2104; and United States Supreme Court Rule 17.

CONSTITUTIONAL PROVISIONS AND STATUTES THIS CASE INVOLVES

A. Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis Added)

B. Ohio Revised Code Section 2925.03(A)(3): (full text set forth in Appendix)

> No person shall knowingly do any of the following:
>
> Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

C. Ohio Revised Code Section 2925.03(F):

> It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for processing a bulk amount of a controlled substance or for cultivating marijuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or

mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use.

D. Ohio Revised Code Section 2925.11(C)(3): (full text set forth in Appendix)

(A) No person shall knowingly obtain, possess, or use a controlled substance.
(C) Whoever violates this section is guilty of drug abuse.
(3) If the drug involved is marijuana, drug abuse is a misdemeanor of the fourth degree, unless the amount of marijuana involved is less than one hundred grams, the amount of marijuana resin or extraction or preparation of such resin, is less than five grams, and the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.
(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness,

E. Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

F. Fourth Amendment, United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

G. Fourteenth Amendment, United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In March, 1979, Defendant-Appellant's eleven-year old daughter brought a marijuana leaf to school, gave it to her teacher, and told her that her Mother grew marijuana at their home, and that her parents smoked or used it.

The Geauga County Welfare Department child services department and the Chester Township Police were notified. A field test was conducted on the leaf, which indicated it was marijuana. Based on this information a daytime Search Warrant of Defendant-Appellant's residence in Chester Township, Geauga County, Ohio, was obtained (Appendix A-4) from the Chardon Municipal Court, for allegedly violating Ohio Revised Code Section 2925.03(A)(3) (Cultivating Marijuana).

When the search was conducted, Defendant-Appellant's Wife was at home. Defendant-Appellant came home during the search and then left before it was completed. The search revealed marijuana seedling plants growing in pots in the bedroom of the Defendant-Appellant and his Wife; there were also seedling plants growing on shelves with concrete block supports in the basement of the home of Defendant-Appellant and his Wife. These seedling plants were seized by the State. No statements were made by Defendant-Appellant or his Wife.

Defendant-Appellant and his Wife were then indicted for violating O.R.C. Section 2925.03(A)(3) (Drug Trafficking/Cultivating), a Fourth Degree Felony in Ohio punishable from six months to five years in a State Penal institution, and/or a maximum fine of Two Thousand Five Hundred Dollars ($2,500.00).

Defendant-Appellant filed a Motion to Dismiss the charge against him on the basis that it was unconstitutionally vague, ambiguous, and a violation of due process under state and federal law. This Motion was denied, assigned as error on appeal, but affirmed. (Appendix A-6).

Defendant-Appellant also filed a Motion to Supress the Search Warrant on the basis that there were false, misleading, and reckless statements in the Affidavit signed by the police officer. (Appendix A-4). The Trial Court denied this Motion and also denied Defendant-Appellant the opportunity to put on witnesses from the Welfare and Police Department in support of his contentions on the basis that Defendant-Appellant had not made a substantial preliminary showing of an improper Affidavit, citing Franks v. Delaware, 438 U.S. 154 (1978). (Appendix A-5). This ruling was raised on appeal by assignment of error but affirmed (Appendix A-6).

Defendant-Appellant also raised the issue on his Motion to Suppress that the issuance of a formal, criminal search warrant was unreasonable under the circumstances since the probable cause had at most established a non-criminal minor misdemeanor offense under O.R.C. 2925.11(C)(3) and (D). (Appendix A-3). Once again, the Trial Court overruled this argument (Appendix A-5), assigned an error on appeal, and affirmed. (Appendix A-6).

In September, 1979, Defendant-Appellant and his Wife were tried separately to jurors, with Defendant-Appellant's case going forward first. At trial, the State introduced the statement of Defendant-Appellant's eleven-year old daughter stating that her Mother grew marijuana and that her parents used it (Appendix A-4); the State also had an expert witness identify the seedlings as marijuana and how the seedlings under proper conditions could grow to several

feet in height, with broad leaves, yielding certain amounts of marijuana, etc. The actual amount of marijuana in these seedlings was far less than 100 grams. The State's case also established that some of the seedling plants in the bedroom of Defendant-Appellant and his Wife, were under a transit with Defendant-Appellant's hat on it, that tnere was an artificial light attached to the transit; that the seedling plants in the basement were on shelves supported by concrete blocks, and that Defendant-Appellant was a mason by trade. Defendant-Appellant did not take the stand.

Defendant-Appellant moved for an acquittal at the close of the State's case on the basis that all that the State's evidence had shown was that his Wife cultivated the marijuana, that his Wife and Defendant-Appellant smoked it, and that at most, Defendant-Appellant himself was only in violation of O.R.C. 2925.11(C) and (D), possession or use of marijuana, a minor misdemeanor,

non-criminal offense. No evidence was introduced that Defendant-Appellant had used the marijuana other than for his own personal use. The Trial Court denied this Motion, this was assigned as error on appeal, and it was affirmed.

The Trial Court then instructed the jury, including the affirmative defense instruction of possession/cultivation for personal use, which instruction required the Defendant-Appellant to prove this defense by a preponderance of the evidence. Objection was made by Defendant-Appellant, overruled by the Trial Court, assigned as error on appeal, but affirmed. (Appendix A-6). Defendant-Appellant was convicted of the Fourth Degree Felony of Cultivating, O.R.C. 2925.03(A)(3). (Appendix A-2).

A few days later Defendant-Appellant's Wife was tried to a jury before the same Trial Judge, took the stand, corroborated her daughter's statement that she alone was growing the marijuana seedlings, that she and her husband, Defendant-Appellant used

it for their own personal use: she was convicted of the minor misdemeanor, non-criminal offense of possession/use of marijuana less than 100 grams and was fined $100.00. (Appendix A-8).

Within a very short time of Defendant-Appellant's Wife's trial, Defendant-Appellant bumped into one of the jurors for his trial at a local drugstore. This juror asked Defendant-Appellant if he knew the Jury Foreman, one Kolsom, whom Defendant-Appellant did not know. Defendant-Appellant then learned from this juror that during deliberations, this Jury Foreman claimed to know Defendant-Appellant, claimed to know that Defendant-Appellant made his living from selling drugs, and other such non-evidentiary, prejudicial statements. Defendant-Appellant's trial counsel looked into this matter further, and also found out that the Jury Foreman had a tire business in Chester Township (Defendant-

Appellant's township) selling tires to the Township and Police Department (which department had brought the charges against Defendant-Appellant). On his jury questionnaire and at voir dire the Foreman had indicated he was retired from a job in Cleveland.

Defendant-Appellant then filed a Motion For A New Trial on the basis of juror misconduct in violation of his State and Federal right to an impartial jury. At this hearing, Defendant-Appellant produced another juror beside the one he had met at the drugstore. Both indicated how the Foreman's non-evidentiary remarks bothered their consciences and that he had influenced them against Defendant-Appellant (Appendix A-9). The misrepresentations of the Foreman concerning his employment was also established at this hearing. The Court also took the testimony of the Foreman where it was further established that he had been the victim of a crime which was not admitted

by him at voir dire, though asked.

Despite all this evidence of misconduct, bias, and misrepresentations by the Jury Foreman to the Court and Trial Counsel, and despite the Trial Court finding that this Foreman had " ... probably misled both counsel ...," that he had made statements to his fellow jurors to the effect that Defendant-Appellant made his living by growing marijuana, and that the Court did not condone his conduct, the Trial Court found that Defendant-Appellant received a fair trial and overruled the Motion for a new trial! (Appendix A-10).

On January 8, 1980, the Trial Court sentenced Defendant-Appellant to the Ohio Correctional Medical and Reception Center at Columbus, Ohio, for a period of not less than two nor more than five years, and fined him $500.00. The jail sentence was suspended and Defendant-Appellant placed on probation for a period of two years. It is

from this felony conviction that Defendant-Appellant appeals.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. Jury Misconduct/Denial of Impartial Jury: Defendant-Appellant is now a convicted felon under Ohio Law as a result of his State and Federal right to an impartial jury having been violated by a biased juror guilty of misconduct. This desecration of our jury system has been tolerated by the Ohio Eleventh District Court of Appeals affirmance of Defendant-Appellant's conviction, and by the Ohio Supreme Court's refusal to grant certiorari.

In U.S. v. Howard, 506 F.2d 865 (1975) the United States Fifth Circuit Court of Appeals vacated the district Court's order denying Defendant's Motion for a New Trial where a juror's Affidavit, indicating the extrinsic fact that the accused had been in trouble previously, had been introduced by a juror into the jury room though no such

evidence had been admitted during trial.

This Federal Appellate Court stated regarding jury deliberations and conduct:

> "... We cannot tolerate prejudicial factual intrusion into that sanctum lest our courts return to the darker days of our jurisprudence history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; ... we must apply a constitutional salve ... This danger to fair trials is most acute when facts which have not been tested by the trial process have been intentionally communicated directly to the jurors ... (at 866) While the 13th century jury may have been selected precisely because of its ready familiarity with background facts, this no longer fits our conception of the jury's role ... (at 867) ... prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the government to demonstrate the harmlessness of any breach to the defendant ..." (at 869). (Emphasis Added)

See also 58 ALR 2d 556, Admissibility and Effect in Criminal Case, of evidence as to Juror's Statements, during deliberations as to facts not introduced into evidence:

> "Most of the Courts which have received jurors' affidavits or testimony as to improper statements made by other jurors in the course

> of deliberations have taken the view that where the statements in question related to a matter not in evidence, and having a tendency to reflect upon the accused's claim of innocence or the degree of his guilt, it would be presumed that it did in fact have an improper effect upon the jury's deliberations and was prejudicial to the accused ... (at 568) ... little or no weight would be given to jurors' testimony that they were not influenced by improper statements made in the jury room (at 573-4) ... A juror's remarks to his fellows, in the course of the jury's deliberations, that defendant was of a bad character or had a bad reputation have frequently been regarded as so prejudicial as to require a new trial ... (at 577). (Emphasis Added)

B. Unconstitutionality of O.R.C. Section 2925.03(A)(3): The vague, ambiguous wording of O.R.C. Section 2925.03(A)(3), Cultivation, coupled with the affirmative defense Section O.R.C. 2925.03(F) and Section O.R.C. 2925.11(C) and (D), has permitted Defendant-Appellant to be convicted of a felony, while his Wife, who was charged under the same section, and who the evidence actually showed was growing the marijuana, was convicted of a minor misdemeanor, non-

criminal offense! The allowance of such vagaries and ambiguities which can and did result in such extreme outcomes to Defendant-Appellant and his Wife are repugnant to the Constitution as a violation of loss of liberty without due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

C. Due Process Denial of Evidentiary Suppression Hearing: The denial by the Trial Court to Defendant-Appellant of an evidentiary hearing challenging the validity of the search warrant was an abuse of discretion in violation of Defendant-Appellant's right to due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. Defendant-Appellant had filed a Motion to Suppress the property seized under the warrant on the basis of false statements by the Affiant, attached a memorandum in support of the Motion, and subpoenaed witnesses for the

suppression hearing. At this hearing the Trial Court quashed the witness subpoenas and refused to permit them to testify. The Court incorrectly relied on Franks v. Delaware, 438 U.S. 154, 57 L.Ed. 2d 667 in denying this hearing.

It is true that Defendant-Appellant did not attach Affidavits to his Motion to his Motion to Suppress specifying the invalidity and falsifications in the Search Warrant Affidavit, however, he had filed a supporting Memorandum with his Motion, and subpoenaed the witnesses to the Suppression Hearing to demonstrate that the police officer procuring the warrant and signing the warrant-affidavit, had not personally talked to Defendant-Appellant's minor daughter regarding the marijuana as alleged in the search warrant affidavit. Defendant-Appellant's trial counsel stated this to the Court at the start of the Suppression Hearing and had the witnesses there,

ready to establish that and other points that were not correct in the search warrant affidavit, but the Court, incorrectly relying on Franks, supra, quashed the subpoenas and denied an evidentiary hearing, citing the portion of Franks requiring affidavits with the Motion. It should also be noted that this Court found in favor of the accused in Franks, and upheld his right to an evidentiary hearing on a Motion to Suppress.

D. Unreasonableness of Issuance of Search Warrant for Non-Criminal Misdemeanor: The Fourth Amendment of our United States Constitution protects us from "unreasonable" searches and seizures. In the instant case, the State utilized the time, expense, and seriousness of the warrant process for what the probable cause had established was at most a minor misdemeanor, non-criminal offense under Ohio Law.

As Justice Jackson, concurring in McDonald

v. U.S., 335 U.S. 451 at 460 (1948) stated, concerning the enforcement against the numbers racket (malum prohibition) versus malum in se:

> "This method of law enforcement displays a shocking lack of all sense of proportion."

See also, Nuslein v. District of Columbia, 115 F. 2d 690, 696 (1940).

E. Conviction a Due Process Violation When Evidence/Proof Patently Insufficient: It was a violation of Defendant-Appellant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, to be convicted beyond a reasonable doubt of Trafficking/ Cultivating marijuana, when the evidence had shown Defendant-Appellant's Wife actually grew the marijuana, Defendant-Appellant only smoked it, Defendant-Appellant and his Wife occupied the bedroom and basement where the marijuana seedling plants were grown, Defendant-Appellant's transit

and hat were above the bedroom seedlings, the basement seedlings were on shelves with concrete block supports, and Defendant-Appellant was a mason.

In order to prove beyond a reasonable doubt the element of "cultivation" the State had to show that Defendant-Appellant had " ... planted, watered, fertilized, or tilled the plants." (Ohio Revised Code Section 2925.01(G), Appendix A-11). No such evidence was presented.

See Delgado v. U.S., 327 F. 2d 641 (1964) where the Court reversed the Defendant's and spouse's conviction regading marijuana, on the basis of insufficient evidence to sustain an element of the offense, namely possession, when the marijuana was found in the bedroom of the Defendant and his Wife. The Court further held that the guilt must be individual.

F. Due Process Violation When Defendant-Appellant Required to Prove Element of

Defense by Preponderance of Evidence When That Element is Properly Raised in State's Case In Chief: The placing upon Defendant-Appellant the burden of going forward with evidence of solely personal use and with burden of proof, by preponderance of evidence, of possession/cultivation of marijuana solely for personal use, was a violation of the due process clauses of the Fifth and Fourteenth Amendments that prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. To satisfy due process, prosecution must prove beyond reasonable doubt the absence of solely personal use when that issue is properly presented. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 955 S.Ct. 1881 (1975); Krzeminski v. Perini, 614 F 2d 121, 16 Ohio Ops 3d 306, (1980: 6th Cir C.A.).

In Mullaney and the instant case, the central issue revolved around the criminal

element of intent, which intent would significantly determine the criminal result and sanctions. In Mullaney, the difference of intent meant a difference between a nominal fine to life imprisonment; in the instant case, the difference of intent for only personal use or possession meant the difference between a nominal fine not constituting a criminal record (O.R.C. 2925.11(C)(3)), to being a convicted felon, subject to five years imprisonment in a State Penitentiary. In Mullaney, the Supreme Court rejected the State's contention that the burden of proving the absence of intent was unduly, especially:

> " ... when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result ..." at 521, 522 (Emphasis Added)

Under O.R.C. Section 2925.03(A)(3) all the State has to show is that a defendant cultivated marijuana. It does not matter how much or for what purpose. It is then

up to the Defendant to prove himself guilty of a misdemeanor by a preponderance of the evidence of cultivation/possession/use solely for personal use in order to avoid a felony conviction! As was true in the Mullaney case quoted above, such result (and procedure in criminal law) is intolerable!

COPIES OF OPINIONS AND ORDERS

See Appendix for designation and labeling.

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant certiorari to his Petition in order to correct the violation and denial of his federal rights to an impartial jury, clear, unambiguous constitutional statutes, and due process.

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Phone: 285-3179 or
953-9442

PROOF OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Writ for Certiorari were hand-delivered to the office of the Geauga County Prosecutor CRAIG ALBERT, at Courthouse Annex, Chardon, Ohio, 44024 on this _____ day of November, 1982.

EDWARD T. BRICE
Attorney for Petitioner

APPENDIX

A-1 Supreme Court Entries Denying Certiorari

A-2 O.R.C. Section 2925.03

A-3 O.R.C. Section 2925.11

A-4 Statement attached to Search Warrant

A-5 Order Denying Motion to Suppress, etc.

A-6 Court of Appeals Judgment Entry , Opinion

A-7 Judgment Entry Conviction Entry.

A-8 Jean Pauer's Judgment Entry

A-9 Jury Misconduct Transcript excerpt.

A-10 Judgment Entry Denying New Trial.

A-11 O.R.C. Section 2925.01

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-vs-

STATE OF OHIO

APPENDIX TO

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TO THE COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT

EDWARD T. BRICE
Attorney for Petitioner
109 Court Street
Chardon, Ohio 44024
(216) 285-3179

APPENDIX A-1

Supreme Court Entries Denying Certiorari

THE SUPREME COURT OF THE STATE OF OHIO

1982 TERM

No. 82-818

State of Ohio, Appellee

-vs-

Daniel T. Pauer, Appellant

MOTION FOR LEAVE TO APPEAL FROM
THE COURT OF APPEALS FOR GEAUGA COUNTY

September 15, 1982

THE STATE OF OHIO)
) to wit:
CITY OF COLUMBUS)

It is ordered by the Court that this Motion is overruled.

A true copy.

Attest: Thomas L. Startzman, Clerk of the Supreme Court of Ohio.

THE SUPREME COURT OF THE STATE OF OHIO

1982 TERM

No. 82-818

State of Ohio, Appellee

-vs-

Daniel T. Pauer, Appellant

APPEAL FROM THE COURT OF APPEALS
FOR GEAUGA COUNTY

September 15, 1982

THE STATE OF OHIO)
) To wit:
CITY OF COLUMBUS)

This cause, here on appeal as of right from the Court of Appeals for Geauga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Geauga County for entry.

A true copy.

Attest: Thomas L. Startzman, Clerk of the Supreme Court of Ohio

APPENDIX A-2

O.R.C. Section 2925.03

(Aggravated trafficking in drugs; trafficking in marijuana)

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceeding the bulk

amount but in an amount less than three times that amount;

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violating division (A)(3) of this section.

(B) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(C) If the drug involved is a compound, mixture, preparation, or substance included in schedule I with the exception of marihuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(2) Where the offender has violated division (A)(2) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(3) Where the offender has violated division (A)(3) of this section, aggravated trafficking is a felony of the second degree and the Court shall impose

a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years.

(4) Where the offender has violated division (A)(4) of this section, aggravated trafficking is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(5) Where the offender has violated division (A)(5) or (A)(6) of this section, aggravated trafficking is a felony of the second degree and the court

shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree, and the court shall impose a sentence of actual incarceration of five years.

(6) Where the offender has violated division (A)(7) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarcaration of at least seven years.

(7) Where the offender has violated division (A)(8) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of

seven years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of ten years.

(D) If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates this section is guilty of trafficking in drugs.

(1) Where the offender has violated devision (A)(1) or (A)(2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree.

(2) Where the offender has violated division (A)(3) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug

abuse defense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(3) Where the offender has violated division (A)(4) of this section, trafficking in drugs is a felony of the fourth degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months.

(4) Where the offender has violated division (A)(5) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony abuse offense, trafficking in drugs is a felony

of the second degree and the court shall impose a sentence of actual incarceration of two years.

(5) Where the offender has violated division (A)(6) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(6) Where the offender has violated division (A)(7) of this section, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the first degree and the

court shall impose a sentence of actual incarceration of four years.

(7) Where the offender has violated division (A)(8) of this section, trafficking in drugs is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of seven years.

(E) If the drug involved is marihuana, whoever violates this section is guilty of trafficking in marihuana.

(1) Where the offender has violated division (A)(1), (A)(2), (A)(3), or (A)(4) of this section, trafficking in marihuana is a felony of the fourth degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the third degree.

(2) Where the offender has violated division (A)(5) or (A)(6) of this section, trafficking in marihuana is a felony of the third degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the second degree.

(3) Where the offender has violated division (A)(7) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, the Court shall impose a sentence of actual incarceration of one year.

(4) Where the offender has violated division (A)(8) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of one year, and if the offender has pre-

viously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of two years.

(5) If the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor for the first offense and a misdemeanor of the third degree for any subsequent offense.

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a controlled substance or for cultivating marihuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use.

(G) When a person is charged with possessing

a bulk amount or a multiple thereof, the jury, or the court trying the accused shall determine that amount of the controlled substance involved at the time of the offense, and if a guilty verdict is returned shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is a bulk amount or the requisite multiple thereof, or that the amount of the controlled substance involved is less than a bulk amount or the requisite multiple thereof.

APPENDIX A-3

O.R.C. Section 2925.11

(Abuse of drugs)

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to:

(1) manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(2) Any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, where the drug is in the original container in which it was dispensed to such person;

(3) Any person who obtained the controlled substance in accordance with the written order of a member of the patient review board of the Controlled Substance Therapeutic Research Program established by sections 3719.85 to 3719.87 of the Revised Code, if the con-

controlled substance was possessed or used in accordance with the written order and if the controlled substance is in the original container in which it was dispensed to the person, unless the written order specifies that the controlled substance need not be kept in the original container. (Eff. 6-20-80)

(C) Whoever violates this section is guilty of drug abuse:

(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I and II, with the exception of marihuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

(2) If the drug involved is a compound, mixture, preparation, or substance included in schedule III, IV, or V, drug abuse is a misdemeanor of the third degree, and if the offender has pre-

viously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree.

(3) If the drug involved is marihuana, drug abuse is a misdemeanor of the fourth degree, unless the amount of marihuana is less than one hundred grams, the amount of marihuana resin, or extraction or preparation of such resin, is less than five grams, and the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

APPENDIX A-4

Statement attached to Search Warrant

3-8-79 is the date. "I, Danielle Pauer, of my own free will, wish to make the following statement: there is marijuana in my residence in the basement (furnace room and master bedroom). It has been, " I believe it's, "growing there approximately one year. I have witnessed my mother grow these plants from seeds. It grows on a long stalk that varies with the size of the plant. My parents told me it was marijuana and made them smarter. My parents use it. There are approximately fifteen to twenty plants. I brought a sample of the plant in to school."

Signed Danielle Pauer.

APPENDIX A-5

Order Denying Motion to Suppress, etc.

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case Nos.: 79 C 1044 & 79 C 1045

State of Ohio, Plaintiff

-vs-

Daniel T. Pauer & Jean Pauer, Defendants

JUDGMENT

.ed September 18, 1979

JUDGE HANS R. VEIT

These cases came on for hearing this 3rd day of August, 1979, on defendants' motions to suppress, for a bill of particulars, to dismiss the indictment, motion to view the premises and the State's Motion to quash subpoenaes.

After due consideration thereof it is ordered that:

1. Defendants' motions to suppress are overruled. Franks v. Delaware, 438 U.S. 154 (1978). The pertinent parts of the opinion appear at p. 682, 57 L.Ed. as follows:

> "In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false, and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient."

No substantial preliminary showing was made that the affidavit and testimony leading to the issuance of the search warrant contained material false statements knowingly or intentionally made, or made with reckless

disregard for truth. See also State v. Graddy, 55 Ohio St. 2d 132 (1978) p. 134, 135 - footnote number one.

2. The State's motion to quash subpoenaes is granted accordingly.

3. The motion to dismiss the indictment is overruled.

4. The motion to view the premises is overruled.

5. The motions for further bills of particulars are overruled.

Judgment is hereby entered accordingly.

Signed: Hans R. Veit, Judge

cc: John F. Norton, Esq.
James M. Gillette, Esq.
William C. Hofstetter, Esq.

APPENDIX A-6

Court of Appeals Judgment Entry, Opinion

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT
COUNTY OF GEAUGA

COURT OF APPEALS CASE NO. 881

State of Ohio, Plaintiff-Appellee

-vs-

Daniel T. Pauer, Defendant-Appellant

OPINION

Filed April 4, 1982

Before:

Hon. Edwin T. Hofstetter, P.M., Hon. Robert E. Cook J., Hon. Alfred E. Dahling, J., and Robert E. Henderson, J., 5th Appellate District, Sitting by Assignment.

APPEARANCES:

EDWARD T. BRICE, Counsel for Appellant
109 Court Street, Chardon, Ohio 44024

CRAIG ALBERT, PROSECUTOR, Counsel for Appellee, Courthouse Annex, Chardon, Ohio 44024

DAHLING, J.

This is an appeal from a judgment of the Court of Common Pleas, Geauga County, wherein, after a trial by jury, defendant was found guilty of trafficking in marijuana. Defendant was sentenced to two to five years in the Ohio State Penitentiary, which sentence was suspended. He was fined $500.00 and costs.

Defendant's daughter, Danielle Pauer, gave the following written statement to June Gottschling, a social worker at the Geauga County Welfare Department.

> "I, Danielle Pauer, of my own free will wish to make the following statements;
> There is marijuana in my residence in the basement (furnace room) and master bedroom. It has been growing there approximately one year. I have witnessed my mother grow these plants from seed. It grows on a long stalk that varies with the size of the plant. My parents told me it was marijuana and made them smarter.
> My parents use it. There are approximately fifteen to twenty plants.
> I brought a sample of the plant into school."

Apparently this written statement was the result of a classroom discussion about marijuana and drugs in school. A search

warrant was issued. Plants were seized and confirmed they were marijuana.

The defendant has presented the following Assignments of Error for review:

> I. The Trial Court erred to the prejudice of defendant in overruling defendant's Motion to Dismiss the indictment on the grounds that the conduct criminally proscribed in the statute under which the defendant was charged was so vague, ambiguous and uncertain as to be unconstitutional.
>
> II. The Trial Court erred to the prejudice of defendant-appellant when it overruled defendant-appellant's motion to suppress and granted state-appellee's motion to quash subpenas.
>
> III. The Trial Court erred to the prejudice of Defendant-Appellant when it overruled Defendant-Appellant's Motion for Continuance of the jury trial date due to the State-Appellee's last minute, substantial supplemental discovery to defendant-appellant.
>
> IV. The Trial Court erred to the prejudice of Defendant-Appellant when it permitted State-Appellee's expert to testify, over objection, to matters irrelevant to the elements of the crime charged, which matters were prejudicial to Defendant-Appellant.
>
> V. The Trial Court erred to the prejudice of the Defendant-Appellant when it overruled Defendant-Appellant's Motion to dismiss the charges or acquit the Defendant-Appellant at the close of the State's case.

VI. The Trial Court erred to the prejudice of Defendant-Appellant in overruling his request for the jury instruction regarding affirmative defense and personal use.

VII. The Trial Court erred to the prejudice of Defendant-Appellant in overruling Defendant-Appellant's Motion for New Trial, particularly on the grounds of juror misconduct, and the "New Evidence" from Defendant-Appellant's Wife's subsequent trial.

VIII. The Trial Court erred to the prejudice of Defendant-Appellant in not sustaining Defendant-Appellant's objection to the Prosecutor's remark in closing argument referring to Defendant-Appellant pulling a gun in a separate incident.

IX. At the close of the trial, the Trial Court erred to the prejudice of Defendant-Appellant in permitting the State to amend the charge to include the crime and elements of complicity.

X. The Trial Court erred to the prejudice of Defendant-Appellant in refusing to re-read affirmative defense when jury requested the Trial Court to re-read charges during its deliberations.

XI. The cumulative effect of the errors in Defendant-Appellant's trial amounted to prejudice to Defendant-Appellant requiring a reversal.

These Assignments of Error are without merit.

ASSIGNMENT OF ERROR I

Defendant argues the statute is vague, and

that possibly he should have been charged with a misdemeanor. Also, he argues the wife was growing and he was smoking. Unfortunately, defendant's argument is more vague than the statute.

ASSIGNMENT OF ERROR II

Defendant attacks the reliability of his daughter, Danielle, as an informant. Danielle discussed the matter at school, promised to go home and get a plant sample, went home and returned the next day with a marijuana leaf. This was good evidence to base the search on in consideration of Danielle's reliability in an earlier matter. Defendant argues maybe Danielle got the leaf at another person's home. This is not persuasive.

ASSIGNMENT OF ERROR NO. III

Here, Defendant argues the prosecutor sand-bagged him at the last moment before trial by adding to the list of State witnesses. However, he has not shown how this list, in fact, prejudiced him. He suggests the State may have witnesses who could prove

drug sales but this never came to pass.

ASSIGNMENT OF ERROR NO. IV.

Defendant argues it was error for the witness to testify to the size the seedlings would grow to when they mature. This case was tried in Geauga County, a farm community. We are sure farmers know that seedlings become large marijuana plants. As defendant argues, marijuana is no longer a subject of which the general public is not informed. The testimony merely reinforced what the jurors already knew.

ASSIGNMENT OF ERROR NO. V.

Defendant again argues the wife grew and the husband only smoked. Unfortunately, the plants were in a common area, the basement and the master bedroom, on nicely arranged masonry blocks with artificial light provided.

ASSIGNMENT OF ERROR NO. VI.

This Assignment is without merit. The constitutionality of R.C. 2925.03 has already been discussed. The trial court specifically

mentioned cultivating for personal use in his instructions to the jury.

ASSIGNMENT OF ERROR NO. VII.

This Assignment of Error is well argued by the appellee as follows:

> "It is well established that evidence of juror misconduct in a motiom for a new trial cannot be established initially by the affidavits of the jurors. Rather, evidence aliunde must first be offered before the affidavits or testimony of the jurors will be taken. Goins v. State, 46 O.S. 457, 21 N.E. 476; Emmert v. State, 127 O.S. 235, 187 N.E. 862.
>
> In the case at bar, the defense provided evidence of alleged juror misconduct on the part of the foreman, Mr. Kolsom, and subsequently supplemented that evidence with an affidavit. Based upon this evidence aliunde, the trial court allowed two of the jurors to testify concerning statements made by the foreman and what effect, if any, the statements had upon their determination of the appellant's guilt.
>
> It must be emphasized that both of these jurors testified that the statements of Mr. Kolsom did not influence or affect their vote. Juror Keim stated upon cross-examination that he would have voted guilty even without any statements having been made by Mr. Kolsom (Tr. T. p. 35-37) and again reiterated his same statement upon defense redirect examination. (Tr. T. p. 42) Juror Datsko was emphatic that Mr. Kolsom's statement had no influence or effect upon her vote of guilty.
>
> The trial court heard and evaluated

the evidence and testimony submitted during the motion for a new trial. The foreman, Mr. Kolsom, was truthful when he stated he was retired but was not completely truthful since he had other income from his retail business. It is undoubtedly true, as the court pointed out, that the comments of the foreman did mislead counsel. However, the comments did not affect the vote of two jurors who testified at the motion for new trial hearing. There is no evidence which was presented which would show that the comments of Mr. Kolsom influenced other jurors or that Mr. Kolsom failed to decide the case upon the evidence submitted to the jury and the law as instructed by the court. There was no material prejudice to the rights of the accused. The court properly overruled the defense motion for a new trial."

ASSIGNMENT OF ERROR NO. VIII

Defendant objects to a State witness answering on cross-examination that defendant pointed a gun at him. Defendant asked the question and did not complain, at the time, to the answer. His complaint is without merit.

ASSIGNMENT OF ERROR NO. IX

This Assignment is also without merit. R.C. 2923.03(F) has been construed to hold that a party charged as a principal may be

found guilty of complicity. State v. Strub (1975), 48 Ohio App. 2d 57, 355 N.E. 2d 819. Similarly, State v. Duering (1971), 25 Ohio App. 2d 103, held that a claim of aiding and abetting may be brought out at trial.

ASSIGNMENT OF ERROR NO. X

This assignment is also without merit. To agree with appellant's reasoning would require the court to re-read his entire instructions. Although the affirmative defense is intricately interrelated with the trafficking offense, as discussed earlier, there is not compelling reason for the court to re-read more than the jury requested.

ASSIGNMENT OF ERROR NO. XI

We have considered this Assignment of Error and find it is without merit. The fact is this case is simply about a family that was growing a lot of marijuana plants and the young daughter told about it in school. How can the defendant argue he is not guilty when the plants are lining the wall of his bedroom.

Judgment affirmed.

Signed: Alfred E. Dahling, Judge

HENDERSON, J., concurs
5th District, Sitting by assignment

and

COOK, J., Concurs in judgment only.

JUDGMENT ENTRY

STATE OF OHIO)
) SS:
COUNTY OF GEAUGA)

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's OPINION, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

COOK, J., Concurs in judgment only.

Signed: Judge Alfred E. Dahling, For The Court

HENDERSON, J., 5th Appellate District, Sitting by Assignment

and

COOK, J., Concur

APPENDIX A-7

Judgment Entry Conviction Entry

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1044

State of Ohio, Plaintiff

-vs-

Daniel T. Pauer, Defendant

JUDGMENT ENTRY

September, 1979

JUDGE HANS R. VEIT

On the 24th day of September, 1979, personally came the defendant into court with his counsel, William Hofstetter, and the State of Ohio was represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys, and this cause proceeded to trial. Thereupon came

the following persons who were duly impaneled and sworn as jurors, to wit:

LENORE ANNE CRITZER	ALICE M. MEDINA
RUTH M. DATSKO	JOHN S. KESSINGER
ALLEN H. NELLS	DORANELL G. KOLLER
DOUGLAS KRIVOY	HELEN C. FINK
ROY J. KEIM	WILLIAM M. CONNETT
HARRY R. KOLSOM	MARGARET L. WATKINS

MARTHA B. WEBSTER, Alternate

Whereupon opening statements were made by both the State of Ohio and the defendant and the State of Ohio produced evidence. Court then recessed until September 25, 1979, at 9:00 A.M.

On this 25th day of September, 1979, court reconvened at 9:00 A.M., with the defendant being personally present with his counsel, William Hofstetter , and the State represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys.

The State of Ohio produced further evidence and rested. the defendant produced evidence and rested.

Final arguments by both the State of Ohio and the defendant were then heard and the Court instructed the jury as to the applicable law. The jury then retired for deliberation in the custody of the Bailiff who was first duly sworn according to law.

Thereafter, on September 25, 1979, the said Jury returned to open court in the custody of the Bailiff and the said defendant and his counsel being present in court, the said Jury returned their verdict signed by all twelve jurors finding the defendant GUILTY of a Violation of § 2925.03(A)(3) of the Ohio Revised Code, Trafficking in Marijuana and being a Fourth Degree felony.

Whereupon the jury was discharged and the court ordered a presentence investigation report pending sentence.

Bond previously set in this matter was ordered continued.

Signed: HANS R. VEIT, JUDGE

Approved: Richard J. Makowski,
Assistant Prosecuting Attorney

JUDGMENT ENTRY

January, 1980

This matter came on for sentencing on the 8th day of January, 1980, the defendant being present in court with his counsel, William Hofstetter, the State of Ohio being represented by Richard J. Makowski, Assistant Prosecuting Attorney.

The court, after reviewing the presentence investigation report and upon due consideration of all facts presented, sentenced the defendant to the Ohio Correctional Medical and Reception Center at Columbus, Ohio, for a period of not less than two nor more than five years for a violation of § 2925.03(A)(3) of the Ohio Revised Code, Trafficking in Marijuana and imposed a fine of $500.00.

The court then suspended the aforementioned sentence and placed the defendant

on probation for a period of two years under the terms of probation as determined by the Geauga County Common Pleas Court.

Said fine is to be paid within 90 days of this hearing and the costs of this action are to be paid within 30 days of said hearing date.

The court further instructed the defendant of his right to appeal, to obtain counsel, and to have the costs of appeal and documents paid if he is unable to pay.

Signed: HANS R. VEIT, JUDGE

Approved: Richard J. Makowski,
Assistant Prosecuting Attorney

APPENDIX A-8

Jean Pauer's Judgment Entry

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1045

State of Ohio, Plaintiff

-vs-

Jean Pauer, Defendant

JUDGMENT ENTRY

Filed: October 5, 1979

JUDGE HANS R. VEIT

On the 27th day of September, 1979, personally came the defendant into court with her counsel, James M. Gillette, and the State of Ohio was represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys, and this cause proceeded to trial. Thereupon came

the following names persons who were duly impaneled and sworn as jurors, to wit:

ROBERT WALLACE CUSTER	IRENE M. GORTON
DENNIS KING	ELAINE MARIE CHAPMAN
MARGARET A. TURK	BERNICE E. SCHRADER
MYRA PFAU GORDON	ANNABELLE HOLEC
MARIAN R. BIACOFSKY	RICHARD P. WALLIS, JR.
CHARLOTTE A. BECK	ALBIN A. MUREN

JUNE M. LAMPL, Alternate

Whereupon opening statements were made by both the State of Ohio and the defendant and the State of Ohio produced evidence. Court then recessed until September 28, 1979, at 9:00 A.M.

On this 28th day of September, 1979, court reconvened at 9:00 A.M., with her counsel, James M. Gillette and the State of Ohio represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys.

The State of Ohio produced further evidence and rested. The defendant produced evidence and rested.

Final arguments by both the State of

Ohio and the defendant were then heard and the Court instructed the jury as to the applicable law. The jury then retired for deliberation in the custody of the Bailiff who was first duly sworn according to law.

Thereafter, on the 28th day of September, 1979, the said Jury returned to open Court in the custody of the Bailiff and the said defendant and her counsel being present in Court, the said Jury returned their verdict signed by all twelve jurors finding the defendant GUILTY of a violation of Section 2925.11 of the Ohio Revised Code, drug abuse, a minor misdemeanor.

Whereupon the jury was discharged and the Court sentenced the defendant to pay a One Hundred ($100.00) Dollar fine and court costs. Said fine is to be paid within one week of the date of this hearing and the Court costs are to be paid within thirty days of the date of said hearing.

IT IS SO ORDERED.

Signed: HANS R. VEIT, JUDGE
Approved: Richard J. Makowski,
Assistant Prosecuting Attorney

APPENDIX A-9

Jury Misconduct Transcript excerpt

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1044

State of Ohio, Plaintiff

-vs-

Daniel T. Pauer, Defendant

TRANSCRIPT OF PROCEEDINGS

November 1, 1979

JUDGE HANS R. VEIT

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p. 17:

made during the deliberations, did Mr. Kolsom say anything that indicated a prior knowledge of Daniel Pauer?

MR. MAKOWSKI: Objection.

THE COURT: You have to rephrase that. Prior to what?

Q. Knowledge of Daniel Pauer prior to the trial?

MR. MAKOWSKI: Objection, Your Honor. This is absolutely hearsay.

THE COURT: It's overruled.

MR. HOFSTETTER: Your Honor, Mr. Makowski has noted his continuing objection.

THE COURT: It's overruled.

Q. Please answer.

A. Yes, he did. He made the statement that--he says, "Don't be mislead by this man." He said, "I know something about this man." He says --

Q. Did he elaborate on that at all? Did he say what he knew?

A. Yes. He made the comment that this was how Mr. Pauer makes his living.

Q. By this do you know what he was referring to?

p. 19:

Q. Mr. Keim, did Mr. Kolsom say anything else which surprised you in any way and,

specifically, adverse to Mr. Pauer?

A. He did say that if we didn't find Mr. Pauer guilty he would probably sue the Chester Township Police Department.

Q. Did Mr. Kolsom indicate how he know these things?

A. No.

Q. Do you know Mr. Kolsom personally, Mr. Keim?

A. No.

Q. Did Mr. Kolsom discuss his employment at all in the jury room, do you recollect?

A. No, I don't know what he does.

Q. What, if any, impact did Mr. Kolsom's statements have upon you?

MR. BROWN: Objection.

MR. MAKOWSKI: Objection.

THE COURT: He may answer.

A. Well, it did influence my decision.

Q. In what way did it influence? In favor of Mr. Pauer or against Mr. Pauer?

A. Against Mr. Pauer.

MR. HOFSTETTER: Excuse me just a moment.

p. 27:

you the charge in this case. Were those questions not placed to you?

A. Yes.

Q. You didn't hesitate that you could not perform that duty did you?

A. No, I didn't.

Q. You took an oath to perform your duty as a juror in accordance with those instructions?

A. Yes.

Q. Then the Court instructed you again prior to your deliberations that your decision was to be based upon the evidence that was presented here in this courtroom, did he not?

A. Yes.

Q. Are you telling me that your decision was based on something that Mr. Kolsom said rather than the testimony and evidence and law presented to you here in the courtroom?

A. It helped to make up my mind, I think.

Q. Mr. Keim, the elements of the charge

trafficking in marijuana were detailed to you by the Court, were they not?

MR. HOFSTETTER: Objection.

THE COURT: It's overruled.

Q. --Just prior to your deliberation?

A. Yes.

p. 30:

A. Yes, he asked me what--well he asked me about the trial. I forget his exact words.

Q. What was the nature of the questions about the trial that he asked.

A. He said, "What evidence did we base our facts on that we found him guilty?"

Q. Did you respond to his question?

A. Yes, I believe I did at the time.

Q. Did you talk to him about the evidence from the courtroom that you considered in rendering a verdict?

A. Yes.

Q. You also talked to him at that time about Mr. Kolsom's discussions?

A. Yes.

Q. Try to remember exactly what you told

him about Mr. Kolsom's discussions.

A. I believe I asked him if he knew Mr. Kolsom cause it bothered me in the jury room. It bothered me that he made the comment he did.

Q. Did Mr. Pauer indicate that he did know Mr. Kolsom?

A. No, he said he didn't know him.

Q. Mr. Keim, you just indicated that this statement or question by Mr. Kolsom bothered you in the jury room. Did you attempt to contact the Court or the Bailiff or anyone about your concern?

p. 39:

THE COURT: That's overruled, he may answer.

A. I don't recall.

Q. When we spoke last night did I indicate --what made you think that this may be a sentencing proceeding today, Mr. Keim? What may I have said?

A. I don't know. I understood that's what you said to me, but I'm not sure.

Q. Were you willing to come voluntarily?

A. Yes.

Q. Did I offer any enducement in money or transportation expenses or anything like that?

A. No, you didn't.

Q. In fact, you had accepted very readily, did you not?

A. Yes.

Q. Why was that?

A. I guess I felt obligated, I suppose, I don't know.

Q. Now, why would you have felt obligated?

A. For my own peace of mind, I guess.

Q. Now, are you saying that you did not have peace of mind after the trial?

A. Well, I thought about it.

Q. Now, Mr. Makowski asked you the question whether you would have signed the verdict if Mr. Kolsom would not have

p. 46:

Q. Had you heard the same things he was saying in evidence or was there anything--

A. You mean in the courtroom?

Q. Yes.

A. No.

THE COURT: I remember testimony to the effect that Mr. Pauer was a bricklayer.

THE WITNESS: Well, I didn't remember what he was, but that's what I had in mind, but he said that he had a name, but he had never worked. He had never been known to work, but he always had money and then he did say that's how he makes his living.

Q. And you presumed that that meant selling drugs?

A. Well, That's what I thought he meant because that's what we were discussing.

Q. Do you recollect Mr. Kolsom saying anything about the Chester Police?

A. Yes, I do remember him very vaguely mentioning--I had it Sheriff, but it could have been police.

Q. Do you remember in what--if you can't recollect, please state so, what context that came up in?

p. 47:

A. I remember him saying that he had been under surveillance and he told a story about some marijuana being found and they were watching, but no one ever come to harvest it. That's all I remember.

Q. Was he referring to Dan Pauer in that at all?

A. That's what we were discussing and he told me, he told the group that he could tell us something. I said, "well, please do," and he started telling a lot of things about the past and I said, "no, no, don't talk about that because it has no bearing on this case".

Q. What did he do or say when you told him that or asked him to quit?

A. Well, he kept--when he got a chance to talk he would bring over the same thing that he was guilty and he also mentioned that some of the jurors there had children and you wouldn't want him selling the drugs to your children in school. So, he left the impression that that was Mr. Pauer's--where he made his livelihood.

Q. Was Mr. Kolsom even-tempered or even-voiced as he said these things?

MR. MAKOWSKI: Objection.

THE COURT: That's sustained.

Q. Was there any time that Mr. Kolsom directed comments directly at you during the course of the deliberations?

p. 51:

asked you to come, right?

THE WITNESS: Not really.

THE COURT: Well, why?

THE WITNESS: I just wanted to sort of clear my conscience because I felt that I was the only one that thought he was innocent and it went on and on in the jury room until I just said that he was guilty and I didn't think he was. So, I just wanted to say that I still don't think he was guilty.

Q. You still, today, don't think he's guilty?

A. No.

Q. Then, let me clarify something. Earlier, either the Court or I asked you the question

would you still have signed the guilty verdict?

A. Would you please say that again.

Q. You still do not believe he's guilty?

A. No.

Q. Why then did you sign the verdict form?

A. Because they all said they wanted to talk it over.

APPENDIX A-10

Judgment Entry Denying New Trial

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1044

State of Ohio, Plaintiff

-vs-

Dan Pauer, Defendant

JUDGMENT

December, 1979

JUDGE HANS R. VEIT

The defendant was convicted of trafficking in marijuana and he has argued his motion for a new trial both orally and in writing.

Shortly before the trial of the case in chief began, the prosecution advised the

defense of the names of fourteen rebuttal witnesses. The court reserved its ruling on the admissibility of their testimony. Since the defendant did not take the stand, these surprise witnesses were never called. The record is bare as to the nature of their testimony. At best, defendant's failure to testify shows fear of the unknown and lack of confidence in himself. No grounds for a new trial have been shown.

The defendant again attacks the validity of the search warrant. The court has already found the existence of probable cause for its issuance, and the defendant did not lay a foundation for an attack on the affidavit.

The State's drug expert testified that the plants and seedlings found at the defendant's home would, if permitted to grow to maturity, yield a substantial quantity of marijuana in consumable form. Such testimony was within the field of his expertise. True, the question was not asked in terms of scientific certainty (nor objected

to on these grounds), but it is not the lack of a scientific basis that would impair the probative value of such opinion evidence. It is the deduction which the expert was asked to make from the evidence to the effect that these plants would reach maturity. This was certainly a logical and probable inference. The motion for a new trial must be overruled on these grounds.

The defendant also alleges misconduct by a juror. The foreman failed to disclose on voir dire that he owned and operated a tire business in Chester Township. On voir dire and on his questionnaire, he said he was retired. This was a half truth, and it probably misled both counsel. During the deliberation of the jury, the foreman made statements to his fellow jurors to the effect that the defendant made a living by growing marijuana and by suing people and that, unless found guilty, he would sue Chester Township police department again. Evidence of such prior suit had in fact been heard at the

trial in chief. While the court does not condone the conduct of this juror, the defendant was not thereby deprived of a fair trial, and the drastic measure of setting aside the verdict on these grounds is not warranted.

The motion for a new trial is hereby overruled and judgment is entered accordingly.

Signed: HANS R. VEIT, JUDGE

cc: John F. Norton, Prosecutor

William C. Hofstetter, Esq.

APPENDIX A-11

O.R.C. Section 2925.01

(Definitions applicable to drug abuse and controlled substances law.)

As used in Chapter 2925, of the Revised Code:

(A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacture," "marihuana," "official written order," "pharmacist," "pharmacy," "practitioner," "prescription," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meaning as provided in section 3719.01 of the Revised Code.

(B) "Drug dependent person" and "drug of abuse" have the same meaning as provided in section 3719.011 (3719.01.1) of the Revised Code.

(C) "Dangerous drug" has the same meaning as provided in section 4729.02 of the Revised Code.

(D) "Actual incarceration" means that a person is required to be imprisoned for the

stated period notwithstanding any contrary provisions for suspension of sentence, probation, shock probation, parole, and shock parole, except that a person may be transferred from an institution operated by the department of rehabilitation and correction to the custody of the department of mental health or the department of mental retardation and developmental disabilities, as provided in section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the department of mental health or department of mental retardation and developmental disabilities against the period of actual incarceration. An offender serving actual incarceration is eligible for time off for good behavior pursuant to section 2967.19 of the Revised Code if confined in a state penal institution, or pursuant to criteria established by the adult parole authority pursuant to division (E) of section 2967.01 of the Revised Code if confined in a state reforma-

tory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration.

(E) "Bulk amount" of a controlled substance means any of the following:

(1) An amount equal to or exceeding ten grams of twenty-five unit doses of of a compound, mixture, preparation, or substance which is, or which contains any amount or, a schedule I opiate or opium dirivative, or cocaine;

(2) An amount equal to or exceeding ten grams of a compound, mixture, preparation, or substance which is, or contains any amount of, raw or gum opium;

(3) An amount equal to or exceeding two hundred grams of marihuana, or an amount equal to or exceeding ten grams of the resin contained in marihuana, or of any extraction or preparation of such resin, or equal to or exceeding two grams of such resin in a liquid concentrate, liquid extract, or liquid distillate form;

(4) An amount equal to or exceeding thirty grams or ten unit doses of a compound, mixture, preparation, or substance which is, or contains any amount of, a schedule I hallucinogen other than tetrahydrocannabinol, lysergic acid diethylamide, lysergic acid amide, or marihuana;

(5) An amount equal to or exceeding twenty grams of five times the maximum daily does in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance which is, or contains any amount of, a schedule II opiate or opium dirivative;

(6) An amount equal to or exceeding one gram or ten unit doses of a compound, mixture, preparation, or substance which is, or contains any amount of, lysergic acid diethylamide, lysergic acid amide, or tetrahydrocannabinol;

(7) An amount equal to or exceeding five grams or ten unit doses of a compound, mixture, preparation, or substance which is, or contains any amount of phencyclidine;

(8) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance which is, or contains any amount of, a schedule II stimulant or depressant substance, or a schedule III or IV substance;

(9) An amount equal to or exceeding two hundred fifty milliliters or two hundred fifty grams of a compound, misture, preparation, or substance which is, or contains any amount of, a schedule V substance.

(F) "Unit dose" means an amount or unit of a compound, mixture, or preparation containing a controlled substance, such amount or unit

being separately identifiable and in such form as to indicate that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual.

(G) "Cultivate" includes planting, watering, fertilizing, or tilling.

(H) "Drug abuse offense" means any of the following:

(1) A violation of section 2925.02, 2925.03, 2925.11, 2925.12, 2925.13, 2925.21, 2925.22, 2925.23, 2925.31, 2925.32, or 2925.36 of the Revised Code.

(2) A violation of an existing or former law of this or any other state or of the United States, substantially equivalent to any section listed in division (H)(1) of this section;

(3) An offense under an existing or former law of this or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, ship-

ping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(4) A conspiracy or attempt to commit, or complicity in committing or attempting to commit any offense under division (H)(1), (2), or (3) of this section.

(I) "Felony drug abuse offense" means any drug abuse offense that would constitute a felony under the laws of this state except a violation of section 2925.11 of the Revised Code.

(J) "Harmful intoxicant" does not include beer or intoxicating liquor, but means any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefication, paralysis, unconsciousness, asphyxiation, or other harmful physiological

effects, and includes without limitation any of the following:

(1) Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, and any other preparation containing a volatile organic solvent;

(2) Any aerosol propellant;

(3) Any fluorocarbon refrigerant;

(4) Any anesthetic gas.

(K) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

(L) "Possess" or "possession" means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or

occupation of the premises upon which the thing or substance is found.

(M) "Sample drug" means a drug or pharmaceutical preparation that would be hazardous to health or safety if used without the supervision of a practitioner, or a drug of abuse, and that, at one time, had been placed in a container plainly marked as a sample by the manufacturer.

(N) "Standard pharmaceutical reference manual" means the current edition, with cumulative changes if any, of any of the following reference works:

(1) "The National Formulary";

(2) "The United States Pharmacopeia", prepared by authority of the United States Pharmacopeial Convention, Inc.;

(3) Such other standard references as approved by the state board of pharmacy.

(See Tables 2-4 supra and Rev. Code § 3719.01 et seq. infra.)

Supreme Court, U.S.
FILED
JAN 4 1983
ALEXANDER L. STEVAS

No. 82-938

In the Supreme Court of the United States

October Term, 1982

DANIEL T. PAUER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATUTORY PROVISIONS

OHIO REV. CODE ANN. §2901.22(B) (Page):

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

OHIO REV. CODE ANN. §2925.01(A) (Page):

> As used in this chapter:
>
> (A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacturer," "marijuana," "official written order," "pharmacist,"

"pharmacy," "practitioner," "prescription," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meaning as in section 3719.01 of the Revised Code.

OHIO REV. CODE ANN. §2925.01(G) (Page):

As used in this chapter:

(G) "Cultivate" includes planting, watering, fertilizing, or tilling.

OHIO REV. CODE ANN. §2925.01(K) (Page):

As used in this chapter:

(K) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

OHIO REV. CODE ANN. §3719.01(D) (Page):

As used in Chapter 3719 of the Revised Code:

(D) "Controlled substance" means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V.

OHIO REV. CODE ANN. §3719.41, Schedule I(C)(10) (Page):

Controlled substance schedules I, II, III, IV, and V are hereby established, which schedules include the following, subject to amendment [by the state board of pharmacy] pursuant to section 3719.43 or 3719.44 of the Revised Code.

(C) Hallucinogens

Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted under federal drug abuse control laws, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation. For the purposes of this division only, the term "isomers" includes the optical, position, and geometric isomers:

(10) Marijuana

STATEMENT OF THE CASE

Danielle Pauer, daughter of the petitioner, met with Lt. James Cogan of the Chester Township Police Department and stated that in her parents' residence were green plants which she had been told were marijuana. The petitioner's daughter gave leaves from these plants to the officer. The leaves were field tested with a positive result for marijuana.

An affidavit for a search warrant was prepared by Lt. Cogan and presented to the Chardon Municipal Court judge. The judge issued a search warrant on March 8, 1979 authorizing a search in the daytime of petitioner's residence.

In executing the search of the petitioner's residence, the police officers found a quantity of green plants in the master bedroom under a surveyor's transit on which was a hat owned by the petitioner. Another number of green plants were found in the basement on shelves constructed of boards and cinder blocks. The green plants were sent to a forensic laboratory where, by chemical analysis, they were determined to be marijuana plants.

On May 21, 1979, the grand jury of Geauga County, Ohio, returned a one count indictment charging the petitioner with trafficking in marijuana, a felony of the fourth degree in violation of OHIO REV. CODE ANN. §2925.03(A)(3) (Page).

Prior to trial, the trial court overruled the petitioner's motions to dismiss the indictment and suppress evidence. On September 25, 1979, a jury of the Geauga County Court of Common Pleas found the petitioner guilty of trafficking in marijuana as charged in the indictment. The petitioner was sentenced on January 8, 1980 to a minimum term of two

years and a maximum term of five years in the state penitentiary and fined five hundred dollars. The trial court immediately suspended the execution of the sentence and placed the defendant on probation.

A motion for a new trial was subsequently filed by the petitioner on the grounds of newly-discovered evidence and juror misconduct. At the motion hearing, the trial court allowed two of the twelve jurors to testify concerning statements made by the jury foreman and what effect, if any, the statements had upon their determination of the petitioner's guilt. One juror testified that he would have voted guilty even without any statements having been made by the foreman. (Respondent's appendix, p. A1.) The other juror stated that the foreman's statements had no influence upon her vote of guilty. (Respondent's appendix, p. A2.) The trial court overruled the petitioner's motion for a new trial.

The petitioner appealed his conviction to the Ohio Court of Appeals, Eleventh District which affirmed the judgment of conviction on April 1, 1982. On September 15, 1982, the Supreme Court of Ohio overruled the petitioner's motion for leave to appeal and dismissed his appeal as of right.

On December 6, 1982, the petitioner's petition for a writ of certiorari was docketed in this Court.

SUMMARY OF ARGUMENT

A The petitioner was not denied a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States on the grounds of juror misconduct.

B. OHIO REV. CODE ANN. §2925.03(A)(3) (Page), trafficking in marijuana, is not void for vagueness.

C. The trial court's denial of an evidentiary hearing to challenge the truthfulness of the factual statements in the affidavit supporting the search warrant in this case was in accordance with this Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978).

D. The search of the petitioner's residence, upon warrant based on probable cause, for contraband is reasonable and not violative of the Fourth and Fourteenth Amendments of the Constitution of the United States.

E. The evidence presented at the petitioner's trial was sufficient to support his conviction as a matter of law and thus the petitioner was not denied due process of law under the Fourteenth Amendment of the Constitution of the United States.

F. The provision of OHIO REV. CODE ANN. §2925.03(F) (Page) which provides for an affirmative defense of personal use, does not violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT

A. THE PETITIONER WAS NOT DENIED A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES ON THE GROUNDS OF JUROR MISCONDUCT.

The extraneous remarks made by the jury foreman in the case at bar did not cause the jurors who came forward to change their vote and therefore did not deny the petitioner any of his rights under the Constitution of the United States. Both jurors testified that any extraneous remarks did not affect their verdict and that they made their decision based upon the evidence before them at the trial, when asked at the hearing held by the trial court. (Respondent's appendix, pp. A1, 2.)

There was no evidence presented at the new trial hearing which would show that the remarks of the foreman influenced any jurors or that they failed to decide the case upon the evidence submitted in open court and the law as instructed by the trial judge. There was no material prejudice to the rights of the accused. The trial court properly overruled the defense motion for a new trial.

> We recognize that what is prejudicial to a fair trial when the issue of juror misconduct is raised, is a matter that must, to a large extent, be left to the discretion of the trial court and that an appellate court will not reverse on such an issue unless it is established as clearly erroneous.

United States v. Bohr, 581 F.2d 1294, 1302 (8th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); *Little v. United States*,

331 F.2d 287, 295 (8th Cir. 1964), *cert. denied*, 379 U.S. 834 (1964). In the case at bar, the decision of the trial court to not grant a new trial has not been established as "clearly erroneous."

B. OHIO REV. CODE ANN. §2925.03(A)(3) (PAGE), TRAFFICKING IN MARIJUANA, IS NOT VOID FOR VAGUENESS.

This Court has held that, as a matter of due process, a criminal statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Hariss*, 347 U.S. 612, 617 (1954), and that it must not be so indefinite that "it encourages arbitrary and erratic arrests and convictions." *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Statutes which do not meet these tests are constitutionally void for vagueness. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979). "This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 392.

The provisions of OHIO REV. CODE ANN. §2925.03(A)(3) (Page) describe with reasonable certainty the conduct which is forbidden. The statute states:

> (A) No person shall knowingly do any of the following: . . .
>
> (3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance.

The various terms employed in the statute are defined in other sections of Ohio's criminal code. "Knowingly" is defined in OHIO REV. CODE ANN. §2901.22(B) (Page);

"manufacture" is defined in OHIO REV. CODE ANN. §2925.01 (K) (Page); and "controlled substance" is defined in OHIO REV. CODE ANN. §§2925.01(A), 3719.01(D) and 3719.41 Schedule I (C)(10) (Page). "Cultivate" is defined in OHIO REV. CODE ANN. §2925.01(G) (Page) as follows:

> "Cultivate" includes planting, watering, fertilizing, or tilling.

The provisions of OHIO REV. CODE ANN. §2925.03 (A)(3) (Page) "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." The statute proscribes, in terms understandable to lay individuals, that it is illegal to grow marijuana in the State of Ohio. The statute is not so indefinite that "it encourages arbitrary and erratic arrests and convictions" and certainly does not "threaten to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 389, 390 (1979).

C. THE TRIAL COURT'S DENIAL OF AN EVIDENTIARY HEARING TO CHALLENGE THE TRUTHFULNESS OF THE FACTUAL STATEMENTS IN THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT IN THIS CASE WAS IN ACCORDANCE WITH THIS COURT'S DECISION IN FRANKS v. DELAWARE, 438 U.S. 154 (1978).

This Court in the case of *Franks v. Delaware*, 438 U.S 154 (1978), held that a defendant under limited circumstances could challenge the veracity of allegations in an affidavit to obtain a search warrant. This Court held that:

> . . . where the defendant makes a *substantial preliminary showing* that a false statement *knowingly and intentionally, or with reckless disregard for the*

> *truth*, was included by the affiant in the warrant affidavit, and *if the allegedly false statement is necessary to the finding of probable cause*, the Fourth Amendment requires that a hearing be held at the defendant's request. (Emphasis added.)

Id. at 155, 156.

In the case at bar, no affidavits or otherwise reliable statements of witnesses were furnished to the trial court and their absence was not satisfactorily explained. In *Franks v. Delaware*, *I.* at 171 this Court embellished on its holding as follows:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and *those allegations must be accompanied by an offer of proof*. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.* Allegations of negligence or innocent mistake are insufficient. (Emphasis added.)

The mere representations of the defendant's lawyer as to what some witnesses might say is not the type of "substantial preliminary showing" or "offer of proof" required by this Court in *Franks*.

The defendant's attorney made a proffer that his evidence would show that the informant may not have made her statement in the physical presence of the affiant and that the affiant might not have been present during the

entire time that the informant was writing her statement. The affiant did question her however, and the affiant witnessed her signing of the statement. The informant was the petitioner's daughter, aged 12, who resided with the petitioner and voluntarily brought her information to the officials.

Even, assuming *arguendo*, that these statements were false, there was no substantial preliminary showing that they were made "knowingly and intentionally, or with reckless disregard for the truth." Also, the allegedly false statement as to the affiant's physical presence at the time the informant wrote her written statement is not necessary to the finding of probable cause. The substance of the informant's statement is necessary to the finding of probable cause, however, there was no showing made that the substance of the informant's statement was in any manner false.

Thus, the trial court properly denied the petitioner an evidentiary hearing as to the truthfulness of the facts in the warrant affidavit under the decision of this Court in *Franks v. Delaware*, 438 U.S. 154 (1978).

D. THE SEARCH OF THE PETITIONER'S RESIDENCE, UPON WARRANT BASED ON PROBABLE CAUSE, FOR CONTRABAND IS REASONABLE AND NOT VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

In the case at bar, the informant (petitioner's daughter) came to the police with reliable information that her parents had marijuana plants growing inside their home and that she had seen the live plants recently. She even presented a leaf of one of the plants to the police, which tested positive for marijuana.

The number of plants reported gave the law enforcement officials and the municipal court judge probable cause to believe that the alleged plants were being grown for more than mere personal use. The cultivation of marijuana is a felony of the fourth degree under OHIO REV. CODE ANN. §2925.03(A)(3) (Page). Thus, the law enforcement officers searched the petitioner's residence pursuant to a valid search warrant for evidence of a felony. Their search was for contraband, *i.e.* marijuana. A search for contraband on a warrant issued upon a showing of probable cause has always been considered reasonable under the Fourth Amendment. *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).

E. THE EVIDENCE PRESENTED AT THE PETITIONER'S TRIAL WAS SUFFICIENT TO SUPPORT HIS CONVICTION AS A MATTER OF LAW AND THUS THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In the case at bar, the substantial evidence produced by the state consisted of the facts that the petitioner permanently resided at the residence searched, slept in the bedroom where the marijuana plants were found, had his hat on top of a transit which had been specifically modified to accommodate a grow light for the marijuana plants, and had constructive control of the basement area where marijuana plants were illuminated by a grow light and supported by a specially constructed set of shelves comprised of boards and building blocks. It is also to be noted that the petitioner was a mason by trade. These facts, along with the statements by the petitioner's daughter that her parents used marijuana, justify the jury's obvious

conclusion that the petitioner knew the marijuana plants were in his home and participated in their growing and production.

Normally, this Court will not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a trial court. Such issues of fact are not an "important question of federal law" which should be settled by this Court. Rule 17.1(c), Rules of Practice of the Supreme Court of the United States; *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 503 (1951); 13 MOORE'S FEDERAL PRACTICE SC 17-43. ¶817.41.

F. THE PROVISION OF OHIO REV. CODE ANN. §2925.03(F) (PAGE) WHICH PROVIDES FOR AN AFFIRMATIVE DEFENSE OF PERSONAL USE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioner's claim is foreclosed by *Patterson v. New York*, 432 U.S. 197 (1977). *Patterson* makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses, such as personal use upon the defendant. *Patterson, supra.*

In *Patterson, supra,* the burden of persuasion was placed upon the defense to prove the existence of the mitigating circumstance by a preponderance of the evidence. This Court upheld such a burden and stated:

> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or pun-

> ishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.
>
> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. . . . Proof of non-existence of all affirmative defenses has never been constitutionally required; . . .

Patterson, supra at 209, 210.

In the case at bar, the trial judge properly instructed the jury under OHIO REV. CODE ANN. §2925.03(F) (Page). His instructions distinguished the elements of the crime of which the state had the burden of proof from the elements of the affirmative defense, on which the petitioner had the burden of proof. The Due Process Clause requires no more. *Patterson, supra.*

CONCLUSION

It is respectfully submitted that the petitioner has wholly failed to sustain his burden of establishing under Rule 17.1 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the state court decided a federal question in a way in conflict with applicable decisions of this Court or of another state court of last resort or of a federal court of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Relevant excerpts from the transcripts of evidence adduced at the hearing on the petitioner's motion for new trial in this action in the Court of Common Pleas of Geauga County, Ohio;

I. Testimony of juror, Roy J. Keim:

A. Cross examination by Assistant Prosecuting Attorney Richard J. Makowski (Transcript pp. 36, 37):

Mr. Makowski: Would you have signed, would you have agreed to a guilty verdict against Dan Pauer, based on the evidence that was presented in the courtroom, if Harry Kolsom had not made the statement about Dan Pauer suing the Chester Police?

Mr. Keim: I probably would have, yes.

B. Re-direct examination by defense attorney William C. Hofstetter (Transcript p. 42):

Mr. Hofstetter: Now, asking the same question that Mr. Makowski asked, but adding in that other information that you just stated that he said, he'd sue, that he didn't have a steady job, and the information about the shotgun, would you still have signed the verdict were it not for that information?

Mr. Keim: You mean if I wouldn't have heard that information?

Mr. Hofstetter: Right.

Mr. Keim: Yes, I still would have, guilty.

Mr. Hofstetter: And why is that?

Mr. Keim: Based upon the evidence I heard during the trial.

II. Testimony of juror Ruth Datsko:

A. Direct examination by defense attorney William C. Hofstetter (Transcript p. 48):

Mr. Hofstetter: Was there anything in the statements Mr. Kolsom said that influenced your decision to change your vote?

Mrs. Datsko: No.

B. Direct examination, continued (Transcript p. 49):

The Court: Are you telling us that Mr. Kolsom didn't influence you to change your vote?

Mrs. Datsko: No, absolutely he did not.

C. Direct examination, continued (Transcript pp. 51, 52):

Mr. Hofstetter: You still do not believe he's guilty?

Mrs. Datsko: No.

Mr. Hofstetter: Why then did you sign the verdict form?

Mrs. Datsko: Because they all said they wanted to talk it over. So, I just, under the pressure of the whole group I did.

Mr. Hofstetter: Do you recall?

Mrs. Datsko: Because it was getting late and I thought they wanted to go home. I thought they would get into trouble at home. That's all.